Here the law, as I understand it, is that matter published in a newspaper concerning a person against whom no proceedings are pending cannot be a contempt of court."

In the present case, there appears to be no embarrassment or prejudice which could be seen to exist in the matter published which affects or tends to affect the exercise by the applicant of his statutory functions. There appears to be no valid reason why the applicant should be prejudiced or embarrassed in the exercise of his functions. As regards the allegation of prejudice to a fair trial, it is clear that the allegation is wholly unrelated to and indeed it does not in effect refer to a pending trial — a trial of any person or persons charged or who has been arrested with a view to being charged.

In the circumstances of this case, it is my judgment that there is nothing in the articles which is calculated to interfere with or obstruct or have a tendency to interfere with or obstruct the due administration of justice. For these reasons, I dismiss this application with costs.

Application dismissed.

Solicitors: *Shearn, Delamore & Co.*

NIK MOHAMED SALLEH v. TENGKU BESAR ZABIDAH

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kota Bharu — Federal Court Civil Appeal No. X. 86 of 1969]

Land Laws — Contract — Sale of land — Agreement by beneficiaries to sell land belonging to deceased — Other beneficiaries not parties to agreement — Agreement enforceable against beneficiaries who entered into agreement — Specific performance — Contracts (Malay States) Ordinance, 1950, ss. 43 and 44 — Specific Relief (Malay States) Ordinance, 1950, ss. 17 and 19.

The second and third defendants and one Nik Ti, since deceased, entered into an agreement for the sale of a piece of land to the respondent. The said land was at the date of the agreement held in the name of Nik Abdul Majid who was the son of Nik Ti deceased, husband of the second defendant and father of the third defendant. The appellant was the administrator of the estate of Nik Ti. Nik Abdul Majid left four other children who were not signatories to the agreement. Subsequently the appellant paid $1,500 to the other beneficiaries of the said land and the land was transferred to him as the administrator of the estate of Nik Ti. The learned trial judge gave judgment in favour of the respondent. The first defendant appealed on the ground *inter alia* that the other beneficiaries of Nik Abdul Majid had not agreed to the transfer and were therefore not bound by the agreement.

Held, dismissing the appeal: the agreement was enforceable against the second defendant, third defendant and the estate of Nik Ti deceased and in the circumstances of the case as the land had become the property of the estate of Nik Ti deceased, the learned trial judge was right in directing the appellant as the administrator of the estate of Nik Ti deceased, to transfer the whole land to the respondent.

Cases referred to:-

(1) *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1914-15] All E.R. Rep. 333.

(2) *Horrocks* v. *Rigby* (1878) 9 Ch. D. 180.

(3) *Abdul Karim Basma* v. *Weekes & Ors.* [1950] 2 All E.R. 146; [1950] A.C. 441.

(4) *Attorney-General* v. *Day* (1749) 1 Ves Sen. 218; 27 E.R. 992.

(5) *Lumley* v. *Ravenscroft* [1895] 1 Q.B. 683.

(6) *Price* v. *Griffith* (1851) 1 De G.M. & G. 80; 42 E.R. 482.

(7) *Thomas* v. *Dering,* 48 E.R. 488.

(8) *Holroyd* v. *Marshall* (1862) 10 H.L.C. 191, 211; 11 E.R. 999, 1007.

(9) *Pundlik Daryaji* v. *Jainarayan Maliram Shop* A.I.R. 1949 Nag. 83.

(10) *Kennewell* v. *Dye* [1949] 1 Ch. 517.

(11) *Siah* v. *Tengku Nong* [1964] M.L.J. 43.

FEDERAL COURT.

C. Jegathesan for the appellant.

Raja Abdul Aziz for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Kota Bharu under which the learned trial judge granted the plaintiff's claim for specific performance of an agreement dated 18th November 1948, for the sale to her of a piece of land situated in the township of Kota Bharu by the second and third defendants and one Nik Ti who is now deceased but is represented by the first defendant as the administrator of her estate.

The said land at the date of the agreement was held in the name of Nik Abdul Majid bin Wan Mohamed Tahir who was the son of Nik Ti deceased, husband of the second defendant and father of the third defendant. Nik Abdul Majid died intestate and these three persons are his heirs under Muslim law. Under the agreement, the three persons, to whom I have referred, agreed to sell the said land to the plaintiff at the price of $190 of which $170 was paid when the document was signed, and the balance of the purchase price was to be paid on the registration of the transfer of the land to the plaintiff.

There were provisions in the agreement also for the return of the $170 and payment of damages fixed at $170 to the plaintiff should the three signatories fail to effect the necessary transfer.

The first defendant, as the administrator of the estate of Nik Ti (who also died intestate), disputed the claim and in so doing filed a statement of defence, apparently drafted by a lay man. He denied most of the allegations in the statement of claim, but his long worded statement of defence as to its relevant parts might be summarised as follows:

(1) That the three signatories in the agreement were not the only beneficiaries of Nik Abdul Majid bin Nik Mohamed Tahir deceased and were therefore not entitled either to the whole of the land or to represent all the beneficiaries of the estate of the said Nik Abdul Majid. In fact, Nik Abdul Majid deceased left three other sons and a daughter.

(2) That the agreement was illegal because the three signatories to the agreement were not the registered owners of the land.

(3) That the defendants are ready to refund the deposit paid and the damages mentioned in the agreement.

At the trial, the plaintiff gave evidence that after the execution of the said agreement she took over the control of the land and paid the land rents and in support she produced land rent receipts for the years 1961, 1962, 1966 and 1967. She also said that the land rent receipts for the other years had been lost whilst in the keeping of her husband who had since died. She produced three documents purporting to be certified copies of proceedings before two settlement officers, namely:

(1) Exhibit P.6 being notes of evidence taken on 22nd October 1962 by a settlement officer and

(2) Exhibit P. 7 being notes of evidence taken on 31st December 1962 by another settlement officer.

(3) A letter from the assistant public trustee, Kelantan, which enclosed a copy of a letter from the first defendant to the assistant public trustee dated 25th October 1964.

I will refer to these documents again in view of the fact that counsel for the first defendant before us objected to the admission of Exhibit P. 6.

I might point out here that the letter from the assistant public trustee requested the plaintiff to remove her *caveat* against the land to enable the transfer of the said land to the name of Nik Ti deceased. In the letter from the first defendant to the assistant public trustee, the first defendant maintained that the agreement made by the three signatories in favour of the plaintiff was null and void and that the beneficiaries offered to pay back to the plaintiff part of the purchase price she paid to the three signatories, and so far as these beneficiaries were concerned, their decision was final and if the plaintiff should not agree to settle this matter she was at liberty to take any legal action she thought fit.

Evidence was also given for the plaintiff by a licensed land appraiser who expressed the opinion that the value of the land would now be about $10,000 and in 1965 about $7,000 and in 1948 about $500 per acre. He also said that a lane which joins the main road has now been built next to the land, which would explain the inflated price of the land.

The first defendant in his evidence said that he is now the administrator of the estate of Nik Ti and that the deceased Nik Abdul Majid left four other children and these four children were not signatories to the said agreement. In 1951 the third defendant applied for letters of administration in the estate of his father Nik Abdul Majid. In 1962, the public trustee was appointed administrator and on the application of the public trustee the first defendant was appointed as administrator of the estate of Nik Ti. The first defendant also said he had paid $1,500 to the other beneficiaries for the said land. He maintained that he had been in occupation of the land since 1948 and denied that the plaintiff was in occupation until three or four years previously. He further said that one Ismail bin Mohamed had been cultivating the land for the last seven years, for which he paid rent to him. He produced receipts for 1966 and 1967, and said that he had lost the earlier receipts. The trial judge rejected this part of the first defendant's evidence.

The second defendant said that she affixed her thumb print to the agreement on being told that it was for the sale of the land to the plaintiff. I might pause to point out here that apparently this lady by merely saying so and nothing else did not appear to wish to dispute the agreement of sale of the plaintiff, notwithstanding the fact that in the first defendant's statement of defence in paragraph ii(d) he alleged that the second defendant was an illiterate person and did not know the contents of the agreement at the time she put her thumb print, and that she did all that merely to oblige her mother-in-law Nik Ti.

The third defendant affirmed that he agreed to sell the land but went on to say that he could not now transfer the land to the plaintiff because the land was not registered in his name. In answer to questions by plaintiff's counsel he agreed that he admitted before the settlement officer that he signed Exhibit P. 1, which was a sale in favour of the plaintiff for $190.

The learned judge gave judgment in favour of the plaintiff and in so doing pointed out that all the beneficiaries had agreed before the settlement officer to the transfer of the said land to the plaintiff, and that the fact that the land was subsequently transferred to the first defendent showed that it was their desire that the first defendant should comply with the wishes of Nik Ti and the other two defendants by transferring the said land to the plaintiff in accordance with the said agreement.

On the question whether he should grant specific performance of the agreement or award damages in lieu thereof, he expressed the view that an award of damages would have the effect of penalising the second and third defendants who were not resisting specific performance, and besides the value of the land had gone up considerably.

The first defendant appealed against that judgment to this court.

There were several grounds of appeal argued by counsel. One of them was against admission of Exhibit P. 6 but as quite rightly pointed out by counsel for the plaintiff, although this was a ground of appeal, counsel for the appellant did not refer to it in his submission. In my view this document is admissible because it is a copy of a public document. See section 74 of the Evidence Ordinance.

The next ground of appeal was that the learned judge was wrong in holding that all the *warith* agreed to the transfer of the land to the plaintiff, because four other *warith* of Nik Abdul Majid deceased were not present at the hearing. These four *warith* who did not sign the agreement and who did not appear before the said settlement officers were therefore not bound by the agreement and therefore the agreement was bad *ab initio*. In support counsel cited *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1]

In my view, however, the said agreement may be enforced against the second defendant, third defendant and the estate of Nik Ti on the authority of *Horrocks* v. *Rigby*[2] referred to with approval by their Lordships of the Privy Council in *Abdul Karim Basma* v. *Weekes & Ors.*[3]

In *Abdul Karim Basma* v. *Weekes & Ors.*, the plaintiff alleged that by an agreement dated 29th November 1946, the first, second and third defendants agreed to sell two houses of which they were tenants in common for £1,900 and that thereupon the sum of £633.6s.8d. was paid to each of the three defendants in full satisfaction of the purchase price. Subsequently these three defendants purported to convey the property to the fourth defendant. The plaintiff then claimed for specific performance of his agreement with the first three defendants. The defence was a denial of this agreement. It transpired later that the first defendant had no power to convey her interest in the land.

Their Lordships of the Privy Council in restoring the judgment of the trial judge (Wright J.) held that although the first defendant had no power to convey her interest, there were no special circumstances which would make it wrong to grant specific performance of the contract in regard to the interests which belonged to the second and third defendants and, therefore, the plaintiff was entitled to enforce the contract against the second and third defendants so as to require conveyance to him of their two one-third shares, with abatement of the purchase price in respect of the interest of the first defendant.

Lord Reid in delivering the judgment of the Privy Council at page 153 said:

"In the present case there are three vendors. One of them cannot convey her interest, but there is nothing to prevent the conveyance of the interests which belonged to the others. This type of case is less common, but one example is *Horrocks* v. *Rigby*[2] where two persons agreed to sell a public house and it was found on investigation that one of them had no interest in it, but that a moiety belonged to the other. In an action by the purchaser against the latter vendor for specific performance, Fry J., said (9 Ch. D. 182): 'I think that where an agreement is entered into by A and B with C and it afterwards appears that B has no interest in the property, A may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete, because from a circumstance of which the purchaser had no knowledge, he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of Lord Hardwicke in *A.-G.* v. *Day*[4]'

In the passage which is quoted by Fry J. (9 Ch. D. 182) Lord Hardwicke L.C. said (1 Ves. Sen. 224): —

"On the other hand, if on the death of one of the tenants in common, who contracted for a sale of the estate, the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other."

Lord Reid then referred to the following judgment of Lindley L.J. in *Lumley* v. *Ravenscroft*[5] cited as authority against the plaintiff's case: —

"Specific performance is out of the question. You cannot get specific performance against an infant; and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misrepresentation or misconduct stated in *Price* v. *Griffith*[6] and *Thomas* v. *Dering*[7] but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share. The plaintiff's only remedy is by way of damages."

In reference to the above judgment Lord Reid (after referring to *Price* v. *Griffith* and *Thomas* v. *Dering*) concluded as follows: —

"Their Lordships have reached the conclusion that the weight which must otherwise be given to a judgment of Lindley L.J., is in this case seriously diminished by the circumstances to which they have adverted, and that the decision in *Lumley* v. *Ravenscroft* cannot be regarded as having impaired the authority of *Horrocks* v. *Rigby* or of the opinion of Lord Hardwicke in *A.-G.* v. *Day*. In the present case there appear to be no special circumstances which would make it wrong to grant specific performance, and their Lordships hold that the decision of Wright J. was correct in principle."

The above principles are also to be found in section 43 of the Contracts (Malay States) Ordinance and section 17 of the Specific Relief (Malay States) Ordinance 1950. Section 43 of the Contracts (Malay States) Ordinance reads: —

"43. Where two or more persons have made a joint promise and unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise."

Section 17 of the Specific Relief (Malay States) Ordinance 1950 deals with a purchaser's right against a vendor with an imperfect title and under these provisions the purchaser may compel the vendor to make good his contract out of such interest as he may subsequent to the date of the contract, have acquired in the property.

In the circumstances of the case the learned judge was therefore right in directing that the first defendant, the administrator of the estate of Nik Ti, to transfer the whole land to the respondent now that the whole land had become part of Nik Ti's estate.

I would therefore dismiss the appeal with costs.

Gill F.J.: I am also of the opinion that this appeal should be dismissed.

By their written agreement dated November 18, 1948 Nik Ti binti Wan Abdul Salam, Nik Mah binti Nik Sih and Nik Mohamed Nawi bin Nik Abdul Majid agreed to sell the land comprised in Lot No. 310 in the Mukim of Wakaf Siku, District of Kota Bharu, Kelantan to Tengku Besar Zabidah binti Tengku Abdul Kadir. The land then stood registered in the name of Nik Abdul Majid bin Nik Mohamed Tahir who had died in 1947. The vendors under the sale agreement, being the mother, widow and son respectively of the said Nik Abdul Majid deceased, were three of the beneficiaries of the deceased's estate. Thus, although they had no title to the land which they agreed to sell, they had a *spes successionis* in the land.

Nik Ti died some time after the date of the agreement, and Nik Mohamed Salleh bin Nik Mohamed Tahir is the administrator of her estate. A grant of letters of administration to the estate of Nik Abdul Majid bin Nik Mohamed Tahir was issued to the official administrator who, in the process of winding up that estate, transferred the land in question to Nik Mohamed Salleh as administrator. The land thus became the sole property of the estate of Nik Ti deceased.

In the event, Tengku Besar Zabidah as plaintiff brought an action in the High Court at Kota Bharu against Nik Mohamed Salleh, Nik Mah and Nik Mohamed Nawi as the first, second and third defendants respectively, and obtained an order requiring the first defendant to execute a transfer of the land to the plaintiff by way of specific performance of the sale agreement.

In my judgment the High Court was quite right in ordering specific performance of the sale agreement. This is clear from the following passage in the judgment of the Lord Chancellor (Lord Westbury) in *Holroyd* v. *Marshall*[8]:

"... if a vendor .. agrees to sell .. property .. of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, ... For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

The above principle was followed in *Pundlik Daryaji* v. *Jainarayan Maliram Shop*.[9]

It was contended that the agreement was void in that the other beneficiaries of the estate of Nik Abdul Majid had not joined in the agreement. I do not think I can accept that contention. The agreement was valid as between the purchaser and the three beneficiaries who were parties to the agreement, and so long as the land eventually got vested in any one of them the court could order specific performance. This is clear from section 17(a) of the Specific Relief (Malay States) Ordinance, 1950 which provides as follows: —

"17. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights —

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;"

And, section 44(1) of the Contracts (Malay States) Ordinance, 1950 says that "when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise."

As regards the question as to whether the first defendant as administrator was rightly sued, section 8(1) of the Civil Law Ordinance, 1956 provides that "subject to the provisions of this section, on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate". The proviso to that section does not apply to the present case. Furthermore, section 43 of the Contracts (Malay States) Ordinance, 1950 provides that "when two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise." Thus, that a contract made by a person can be enforced against the administrator of his or her estate is clear beyond doubt (see also *Kennewell* v. *Dye*[10] and *Siah* v. *Tengku Nong*[11]). In the present case, there appeared to be no special circumstances which made it wrong to grant specific performance of the agreement (see *Abdul Karim Basma* v. *Weekes*[3]).

One of the grounds of appeal in the present case is that the learned judge was wrong in law in refusing to award liquidated damages in lieu of specific performance as stipulated in the agreement. I do not think there is any substance in that ground. Section 19 of the Specific Relief (Malay States) Ordinance, 1950 provides that "a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *Jega & Co.; Rithauddeen & Aziz.*

LEE HOY & ANOR. v. CHEN CHI

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 47 of 1970]

Land Laws — Contract — Sale of land — Application for rescission of contract — Whether compensation may be awarded where rescission refused — Specific Relief (Malay States) Ordinance, 1950, s. 18.

The defendants/appellants had entered into an agreement with the plaintiff/respondent for the sale of a piece of land held under an approved application. The area of the land was not stated in the agreement, but the option for sale signed by the appellants was for 9 acres and the approval of his application for the land was to the extent of 9 acres. The price was calculated at $2,200 an acre and the consideration for the sale was stated to be $16,300. When the document of title was eventually issued, it was found that the area of land was only 5.281 acres. The respondent thereupon applied for rescission of the contract and for the refund of $6,794.20 from the appellants. The learned trial judge dismissed the application for rescission as he found that there had been no misrepresentation by the appellants. He held however that as the respondent had paid for 9 acres it would not be fair that he should have only 5 acres without any compensation and he therefore ordered the refund of $6,794.20 to the respondent, acting on the provisions of the Specific Relief (Malay States) Ordinance. The defendants appealed.

Held, allowing the appeal: the court can only award compensation under section 18 of the Specific Relief (Malay